Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LYNDON B. FREDERICK,
Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the "inevitable discovery" rule has ended the Fourth Amendment requirement that law enforcement officers procure a warrant before conducting a search of a private home.

II. Whether the trial court erred by allowing the prosecution to use evidence, which had been illegally seized and suppressed, on its cross-examination of defendant when that evidence was not brought out by the defense on his direct or cross-examination.

III. Whether it is plain error for the trial court to give an incomplete jury charge on the burden of proof element of the affirmative defense of excusable homicide, under Virgin Islands law.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the title of the case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
Introduction	2
Factual and Procedural Predicate	4
REASONS FOR GRANTING THE WRIT	9
I. THE INEVITABLE DISCOVERY EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE, PROHIBITS THE WARRANTLESS SEARCH OF A PRIVATE HOME BY A POLICE INVESTIGATOR BASED SOLELY ON HIS PERSONAL BELIEF THAT PROBABLE CAUSE EXISTS AND THAT THE ISSUANCE OF A WARRANT BY A NEUTRAL MAGISTRATE, IF AN APPLICATION WAS TO BE MADE, IS INEVITABLE	9
II. IT WAS PLAIN ERROR FOR THE TRIAL COURT TO PERMIT THE PROSECUTION TO USE EVIDENCE WHICH HAD BEEN ILLEGALLY SEIZED AND SUPPRESSED FOR IMPEACHMENT AND OTHER PURPOSES WHEN THAT EVIDENCE WAS NOT BROUGHT OUT BY DEFENDANT ON HIS DIRECT OR CROSS-EXAMINATION	13

TABLE OF CONTENTS—Continued

Page

III. IT IS PLAIN ERROR FOR THE TRIAL COURT TO GIVE AN INCOMPLETE CHARGE TO THE JURY ON THE BURDEN OF PROOF ELEMENT OF EXCUSABLE HOMICIDE, UNDER VIRGIN ISLANDS LAW 14

CONCLUSION 16

APPENDICES:

A. Sur Petition for Rehearing, United States Court of Appeals for the Third Circuit dated January 13, 1995 ..... 1a

B. Judgment Order, United States Court of Appeals for the Third Circuit dated December 16, 1994 ..... 3a

C. Judgment and Commitment, District Court of the Virgin Islands dated March 3, 1994 ..... 6a

D. Order, District Court of the Virgin Islands dated January 25, 1994 ..... 8a

E. Partial Transcript, Suppression Hearing Findings of Fact and Conclusions of Law, December 20, 1993 ..... 10a

F. Partial Transcript, Suppression Hearing Findings of Fact and Conclusions of Law, November 8, 1993 ..... 12a

G. Partial Transcript, Suppression Hearing Findings of Fact and Conclusions of Law, November 5, 1993 ..... 19a

TABLE OF AUTHORITIES

CASES — Page

Carter v. United States, 729 F.2d 935 (8th Cir. 1984) 10
Government of the Virgin Islands v. Bellott, 495 F.2d 1393 (3rd Cir. 1974) 15
Government of the Virgin Islands v. Smith, 278 F.2d 169 (3rd Cir. 1960) 15
Government of the Virgin Islands v. Smith, 949 F.2d 677 (3rd Cir. 1991) 3, 8, 15, 16
Horton v. California, 496 U.S. 128 (1990) 10
Katz v. United States, 389 U.S. 347 (1967) 9, 10
Michigan v. Harvey, 110 S.Ct. 1176 (1990) 14
Nix v. Williams, 467 U.S. 431 (1984) 3, 9
Oregon v. Hass, 420 U.S. 714 (1975) 14
Segura v. United States, 468 U.S. 796 (1984) 10
U.S. v. Bagnall, 907 F.2d 432 (3rd Cir. 1990) 13-14
United States v. Havens, 446 U.S. 620 (1980) 14
United States v. Herrold, 962 F.2d 1131 (3rd Cir. 1992) 3, 9, 10, 12
United States v. Kane, 637 F.2d 974 (3rd Cir. 1981) 10
United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 11
United States v. Morgan, 743 F.2d 1158 (6th Cir. 1984) 10
U.S. v. North, 920 F.2d 940 (D.C. Cir. 1990) 14
United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984) 11
U.S. v. Torres, 926 F.2d 321 (3d Cir. 1991) 14
Weeks v. United States, 232 U.S. 383 (1914) 10
Wong Sun v. United States, 371 U.S. 471 (1963) 10

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., Fourth Amendment 2, 3, 9, 10, 11, 13
28 U.S.C. Section 1254(1) 1, 2
28 U.S.C. Section 1291 2
28 U.S.C. Section 2071 2
28 U.S.C. Section 2072 2
V.I. Code Ann. tit. 14, Section 926(1) 2, 7, 8, 15

TABLE OF AUTHORITIES—Continued

RULES AND PROCEDURES	Page
Rule 29, Federal Rule of Criminal Procedure	8
Rule 33, Federal Rules of Criminal Procedure	8
Rule 403, Federal Rules of Evidence	14

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below consist of a Judgment and Commitment, an Order denying, in part, Petitioner's Motion to Suppress Evidence, and Findings of Fact and Conclusions of Law of the District Court of the Virgin Islands [Appendices "C" through "G"]; as well as the Sur Petition for Rehearing and the Judgment Order of the Court of Appeals for the Third Circuit, affirming the decisions of the District Court of the Virgin Islands. [Appendices "A" and "B"].

JURISDICTION

The decision sought to be reviewed is the *Sur Petition for Rehearing*, of the Court of Appeals for the Third Circuit filed January 13, 1995.

Jurisdiction of the Court is found at Title 28 U.S.C. Section 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Fourth Amendment, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States statutes involving supervisory powers of the Supreme Court. 28 U.S.C.A. Sections 2071, 2072 (1988).

United States statutes involving the supervisory powers of the Court of Appeals. 28 U.S.C.A. Section 1254 (1988), 28 U.S.C.A. Section 1291 (1982).

V.I. Code Ann. tit. 14 Section 926, in pertinent part, provides:

> Section 926. Excusable homicide defined
>
> Homicide is excusable—
>
> (1) when committed by accident and misfortune, or in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent;

STATEMENT OF THE CASE

Introduction

This case involves the criminal prosecution, conviction and commitment of Petitioner for a term of forty-one (41) years for murder, possession of a firearm and obstruction of a public officer in the discharge of his duty, based *entirely* upon evidence of a .9mm Glock firearm and other "derivative evidence" acquired by police investigators as result of a warrantless, non-consensual search of his apartment for evidence during their investigation of a reported accidental shooting of his girlfriend in that apartment on the morning of August 13, 1992.

At the conclusion of an evidentiary hearing, the trial court, in an *unprecedented* ruling, permitted the prosecution to introduce the illegally seized .9mm Glock firearm, as well as other "derivative evidence", acquired by the FBI and other expert witnesses, under an erroneous application of the *inevitable discovery* exception to the exclusionary rule. The trial court reasoned that even though the police failed to obtain a warrant from a neutral magistrate, and even though there were no exigent circumstances or evidence that the items would have been found by the police through a lawful independent source, the fact that they retroactively had sufficient probable cause to obtain a warrant, the issuance of which was inevitable, their warrantless search and seizure therefore constitutes reasonable and legally acceptable police procedure.

Second, the trial court, over objection, permitted the prosecution to use evidence of a shotgun and a rifle illegally seized during that warrantless search on cross-examination of Petitioner although no such evidence had been brought out by the defense, directly or indirectly, on his direct or cross-examination.

Third, during its charge, the trial court failed to instruct the jury on the burden of the prosecution to prove beyond a reasonable doubt the absence of the affirmative defense of "excusable homicide" under Virgin Islands law.

In the opinion of Petitioner, these rulings by the trial court not only constitute *plain error*, but are in direct conflict with the Fourth Amendment warrant requirement as articulated in *Nix v. Williams*, 467 U.S. 431 (1984) its progeny, and *U.S. v. Herrold*, 962 F.2d 1131 (3rd Cir. 1992). The failure of the trial court to give a complete jury charge on the burden of proof element of "excusable homicide" constitutes *plain error* under the teachings of *Government of the Virgin Islands v. Smith*, 949 F.2d 677 (3rd Cir. 1991).

Factual and Procedural Predicate

On August 13, 1992 at approximately 7:45 a.m. medical personnel and the police were called by Petitioner Frederick to his one bedroom apartment at 429 Estate Mt. Washington, Christiansted, St. Croix, United States Virgin Islands, to assist his girlfriend, Kemba Hendricks, who had been accidentally shot reportedly by a licensed .9mm Smith & Wesson pistol. Petitioner's mother, Marilyn Frederick, owned and occupied the main house on the premises.

Upon their arrival, the officers immediately took Frederick into custody and escorted him from the premises while the EMTs attended Kemba Hendricks, who was pronounced dead upon their arrival.

Approximately three hours later, several investigating officers initiated a warrantless non-consensual search of Petitioner's apartment for "evidence" of a crime. Lt. James Rhymer, the officer-in-charge, articulated the reasons for their decision to initiate this complete warrantless search of Petitioner's apartment as follows:

> THE WITNESS: Well when we got to the scene and there was nothing else we could do for the victim, we initiated a visual search. We started to think that if an automatic weapon was used, it would eject to the right, so we started looking to the right . . . of the bed and Officer Hitesman saw it (an expended shell casing) under the bed.

Officer Hitesman examined the expended shell casing and concluded that it might have been fired from a .9mm Glock instead of a .9mm Smith & Wesson. Therefore, the officers decided to continue their search of Petitioner's apartment for weapons and other items of evidentiary value. Upon searching above a seven foot high bedroom clothes closet, they found a .9mm semi-automatic Glock firearm beneath a box and clothes; as well as a rifle. They also recovered a sawed-off shotgun from inside a

kitchen closet and miscellaneous ammunition from within a drawer in the kitchen. The expended shell casing, the .9mm Glock, and the .9mm Smith & Wesson were analyzed by the Federal Bureau of Investigation and other forensic experts, who after reconstructing the incident, concluded that the shooting was a homicide.

The prosecution conceded that the search of Petitioner's apartment was conducted without a warrant. Initially, it argued that the items seized were admissible under the doctrines of ((a) actual and/or implied consent, (b) plain view, or (c) exigent circumstances.

A pretrial evidentiary hearing commenced before the Honorable John P. Fullam on November 5, 1993. The Court in a preliminary ruling held that the spent shell casing first found under the bed was in plain view, but that the Glock and shotgun were *illegally* seized because the prosecution had failed to present any evidence of actual or implied consent and because these items were not in plain view. Judge Fullam reserved ruling on the rifle. He also observed that the prosecution was not relying on the "inevitable discovery theory" and that he was inclined to reconsider his *preliminary* ruling as to the .9mm *Glock* if the prosecution

> . . . can come up with a theory that would either alter the evidence on consent or plain view, or if [it] can come up with some arguments inevitable to discovery, . . . [Appendix "G", p. 17a]

In an effort to take immediate advantage of this *advisory opinion*, the prosecution promptly filed a supplemental memorandum on November 8, 1993 which stated in part:

> In the event the court finds that the warrantless seizure of the .9mm Glock and the sawed-off shotgun were not authorized as one of the exceptions to the warrant requirement as was initially argued by the government, it is contended that the weapons should not be suppressed on the ground that they would inevitably have been discovered in any event.

At the conclusion of the evidentiary hearing held on November 8, 1993, Judge Fullam made the following *findings* [Appendix "F", pp. 12a-14a]:

> (a) the police were called to [his apartment] the scene of the shooting by Frederick; (b) by calling the police to the scene, Frederick made [the police] presence in the apartment lawful; (c) the police were, thus, entitled to seize as evidence anything which was in plain view; (d) the spent shell casing found under the bed was in plain view; (e) that Frederick's consent to have the police enter his apartment to recover the victim did not constitute a consent to conduct a *complete* search of his apartment; and (f) there was no evidence of express consent or implied consent to search given by Frederick or his mother.

Judge Fullam further reasoned:

> . . . once it became known to them [the officers] that (Petitioner's) version of the alleged accident was not acceptable, and once it was learned by them that the weapon which he said was used in the shooting was not the weapon used in the shooting, they obviously would have had not only a right to obtain a warrant but inevitable motive for obtaining a warrant and that warrant would have authorized them to search for the weapon (Glock) which was used in the shooting. [Appendix "F", p. 14a]

He continued:

> . . . I conclude that because they [the officers] had the place secured that it would not have been possible for anybody to remove the weapon before they came back with a warrant. And therefore, the discovery of the Glock weapon was inevitable. [Appendix "F", p. 15a]

Consequently, Judge Fullam granted Petitioner's motion to suppress the *rifle* and the *shotgun*, but denied his request to suppress the spent shell casing and the .9mm *Glock* pistol. Judge Fullam left open whether to sup-

press "any other items of evidence which may have been uncovered in Frederick's apartment". On the question raised regarding the "fruits of the illegal search", the court was silent. [Appendix "F", p. 15a]

Asserting that Judge Fullam had clearly misapplied the *inevitable discovery doctrine*, Petitioner prior to the commencement of the trial on December 20, 1993, renewed his motion to suppress, together with a motion *in limine* seeking to suppress all of the aforementioned evidence seized from his apartment, as well as "all findings and opinions rendered by the FBI or other experts which, in whole or in part, rely (sic) on the Glock . . ."

After a brief re-hearing before the Honorable James L. Watson, the shotgun ammunition seized from Petitioner's kitchen cabinet was suppressed. However, Judge Watson refused to disturb Judge Fullam's previous evidentiary ruling. [Appendix "E", p. 10a]

At trial, Petitioner raised the affirmative defense of excusable homicide by reason of accident and misfortune under Title 14 V.I.C. Section 926(1). On the prosecution's case-in-chief, the .9mm Glock firearm was admitted as well as certain "derivative evidence" or "fruits of the poisonous tree". For example, Special Agent Kenneth H. Whitter, an FBI expert on firearms and tool marks, testified that (1) the deformed bullet removed from the head of the deceased could have been fired from the .9mm *Glock*; (2) the expended casing was fired from the *.9mm Glock firearm* pistol; and (3) the deformed bullet was not fired from Petitioner Frederick's licensed Smith & Wesson .9mm pistol. Vincent DiMaio, an expert in *pathology* with a special expertise in wound ballistics, testified as to the mechanics involved when a bullet from the *.9mm Glock firearm* impacted Kemba Hendricks' face, the proximity of the .9mm Glock firearm to her right hand, and his conclusions as to the relative distances involved. Finally, the prosecution introduced a computer animated video tape to illustrate its theory as to how the

prosecution perceived the *.9mm Glock firearm* pistol might have been used during the shooting incident.

Petitioner testified on his own behalf. He extensively explained and illustrated how the accidental shooting occurred. Over the objection of Petitioner, the trial court permitted the prosecution to use evidence of the shotgun and the rifle illegally seized during the warrantless search on cross-examination of Petitioner although no such evidence had been brought out by the defense, directly or indirectly, on his direct or cross-examination.

Prior to the charge, Petitioner's counsel specially requested an instruction on the affirmative defense of "excusable homicide" by accident and misfortune under Title 14 V.I.C. Section 926 (1). The instruction given by the trial judge consisted only of the following:

> Homicide, that is to say, the killing of another person, is excusable under the law of the Virgin Islands when committed by accident and misfortune, or in doing any lawful act by means, with usual and ordinary caution, and without any unlawful intent.

Petitioner's counsel, who was at the time unaware of the ruling in the case of *Government of the Virgin Islands v. Smith,* 949 F.2d 677 (3rd Cir. 1991), did not object to this instruction. Counsel for the prosecution, likewise offered no guidance to the trial judge on the incompleteness of this critical charge.

At the conclusion of the trial the jury found Petitioner guilty as charged. His motions for a new trial and judgment of acquittal made pursuant to Rule 33 and 29, Federal Rules of Criminal Procedure were denied. [Appendix "D", pp. 8a-9a] He was sentenced to a term of forty-one (41) years imprisonment. [Appendix "C", pp. 6a-7a]

On appeal to the Court of Appeals for the Third Circuit, Petitioner's conviction was affirmed by Judgment Order dated December 16, 1994. [Appendix "B", pp.

3a-5a] After filing a petition for rehearing before the panel and suggestion for rehearing *in banc*, the Court of Appeals for the Third Circuit in an Order *Sur Petition for Rehearing* dated January 13, 1995, denied Petitioner's request. [Appendix "A", pp. 1a-2a]

This *Petition for Writ of Certiorari* follows.

REASONS FOR GRANTING THE WRIT

I. THE INEVITABLE DISCOVERY EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE, PROHIBITS THE WARRANTLESS SEARCH OF A PRIVATE HOME BY A POLICE INVESTIGATOR BASED SOLELY ON HIS PERSONAL BELIEF THAT PROBABLE CAUSE EXISTS AND THAT THE ISSUANCE OF A WARRANT BY A NEUTRAL MAGISTRATE, IF AN APPLICATION WAS TO BE MADE, IS INEVITABLE.

Recognizing that an individual's reasonable expectation of privacy from unauthorized government intrusion is constitutionally protected, *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court in *Nix v. Williams*, 467 U.S. 431 (1984) and the Court of Appeals for the Third Circuit in *United States v. Herrold*, 962 F.2d 1131 (3rd Cir. 1992), thoroughly reviewed the procedural safeguards regarding police searches, in the absence of a warrant. *Herrold* at 1137 re-affirmed the principle that:

> Where an individual possesses a reasonable expectation of privacy in a given area, typically the government must obtain a warrant prior to searching that area. As the Supreme Court has stated,
>
> > searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.

> *Horton v. California*, 496 U.S. 128, 133 n.4, 110 S. Ct. 2301, 2306 n.4, 110 L.Ed.2d 112 (1990) (quoting *Katz v. United States*, 389 U.S. at 357, 88 S. Ct. at 514.

The Court in *Herrold* carefully explained the test that must be applied, by continuing to say:

> Thus, in this case if the government had to rely on the warrantless entry to uphold the search and seizure it would have the burden of demonstrating that the search and seizure were permissible under an exception to the Fourth Amendment's warrant requirement. *United States v. Morgan*, 743 F.2d 1158, 1162 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S. Ct. 2126, 85 L.Ed.2d 490 (1985); *Carter v. United States*, 729 F.2d 935, 940 (8th Cir. 1984); *United States v. Kane*, 637 F.2d 974, 979 (3d Cir. 1981). If the government could not make this showing then the exclusionary rule would generally bar the admission of the illegally obtained evidence. *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L.Ed. 652 (1914).

Petitioner asserts a direct Fourth Amendment violation of his expectation of privacy as a result of the Government's failure to demonstrate that the search was legally permissible. He also insists that under the "fruit of the poisonous tree" doctrine, all derivative evidence acquired as a result of the unlawful search conducted by the police at his apartment should have been suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963), *Segura v. United States*, 468 U.S. 796 (1984).

The trial court's decision to avoid the Fourth Amendment warrant requirement by invoking the "inevitable discovery" exception sweeps so broadly that it renders the warrant requirement meaningless. Simply stated, the trial court concluded that after seeing the shell casings, the police had probable cause to search; that if the police had requested a warrant, they would have received one; and that once they obtained a warrant, they would have

searched and found the weapons. Therefore, the court concluded, the discovery of the weapons was "inevitable," and the police should not be faulted for having disregarded the constitutionally mandated steps of obtaining a warrant.

If the trial court's logic is accepted by this Court, law enforcement officers will never have reason to obtain a warrant. Once an officer has satisfied himself that he has probable cause to search, he will be free to proceed without a warrant, confident that he can rely on the "inevitable discovery" doctrine. In substance, if this Court approves the "inevitable discovery" doctrine as applied by the District Court, the exception will devour the rule, and the warrant requirement will become meaningless.

The trial court's application of the "inevitable discovery rule" exception is unprecedented. No Federal case has ever held that probable cause to search a person's home or the inevitability of the issuance of a warrant, *ipso facto*, dispenses with the Fourth Amendment warrant requirement. The reason why such a prophylactic rule does not exist was explained in *United States v. Satterfield*, 743 F.2d 827, 846-847 (11th Cir. 1984) which stated:

> Because a valid search warrant nearly always can be obtained after the search has occurred, a contrary holding would practically destroy the requirement that a warrant for the search of a home be obtained *before* the search takes place. Our constitutionally-mandated preference for substituting the judgment of a detached and neutral magistrate for that of a searching officer, *United States v. Martinez-Fuerte*, 428 U.S. 543, 568, 96 S. Ct. 3074, 3087, 49 L.Ed.2d 1116 (1976), would be greatly undermined.

In addition, the trial court's decision to suppress the rifle and the shotgun because they were illegally seized is irreconcilable with its ruling that the .9mm Glock firearm pistol, recovered during the same search should be treated differently. ***Simply put, if the rifle and the shot-***

gun were illegally seized and inadmissible, so was the .9mm Glock firearm pistol.

Because the police officers conducted an illegal search of Petitioner's apartment for firearms and other evidence, deterrence from such future conduct can only be guaranteed by suppressing *all* the evidence. As the Court stated in *Herrold*, at 1144:

> Importantly, our result, which harmonizes the tainted warrant and independent source doctrines, will not provide the police with an incentive to avoid the warrant requirement. Rather, by its very nature it is only applicable where the police have in fact obtained a warrant. In addition, it will not give the police incentive to search first without a warrant, because *any information discovered in an unlawful search is useless to the police* in a subsequent warrant application. (Emphasis added)

As a result of the lower courts' rulings in Petitioner's case, the Territory's police officers *now* have every incentive to avoid the warrant required and to conduct warrantless searches and seizures in any private home based on the erroneous assumption that "probable cause for a warrant", and the inevitability of the issuance of a warrant, *ipso facto*, dispenses with their constitutional duty to obtain a warrant from a neutral magistrate.

Finally, the courts below completely overlooked the fact that application of the inevitable discovery rule exception involves a two-prong analysis: an *inevitable discovery* test, as well as *independent source* test. This two-prong analysis requires a finding that the government has established by a preponderance of the evidence that: (a) there was a reasonable probability that the .9mm Glock firarm would *inevitably* have been discovered by lawful means, and (b) that the lawful means, which would have made such discovery inevitable, were possessed by the police and were, in fact, being independently and actively pursued by them *prior* to the occurrence of the illegal conduct.

Here, while the .9mm Glock firearm might have been discovered if a search warrant had been lawfully obtained, the evidence fails to satisfy the second prong of this test. The police did not have an *independent source*. The investigators were not in possession of any other lawful means, nor were they in active lawful pursuit of the .9mm Glock firearm prior to the aforementioned illegal search and seizure. The "*inevitable discovery rule*" exception simply does not apply. Consequently, the .9mm Glock firearm and the fruits of that illegal search and seizure, i.e., the testimony of the FBI and the reconstruction expert and others, were clearly inadmissible.

For these reasons, the trial court holding represents an unprecedented and erroneous application of the "inevitable discovery rule" exception which undermines the Fourth Amendment warrant requirement.

II. IT WAS PLAIN ERROR FOR THE TRIAL COURT TO PERMIT THE PROSECUTION TO USE EVIDENCE WHICH HAD BEEN ILLEGALLY SEIZED AND SUPPRESSED FOR IMPEACHMENT AND OTHER PURPOSES WHEN THAT EVIDENCE WAS NOT BROUGHT OUT BY DEFENDANT ON HIS DIRECT OR CROSS-EXAMINATION.

During the defense case-in-chief, Petitioner testified on his own behalf. At no time during his testimony did he make reference to the rifle or shotgun which had been illegally seized by the police and suppressed by the trial court. Despite Petitioner's attempt to maintain a clean record on these items, the trial judge permitted the prosecutor on cross-examination over the objections of counsel to inquire whether petitioner possessed or owned the rifle and shotgun which had been previously ordered suppressed by the court. At that point in the trial, Petitioner had no choice but to admit ownership of these hidden weapons.

The ultimate determination of materiality of evidence is a question of law subject to plenary review. *United*

States v. Bagnall, 907 F.2d 432, 435 (3rd Cir. 1990). The Supreme Court has made clear that the prosecution's use of illegally obtained evidence is restricted to impeach petitioner's testimony on cross-examination which was reasonably suggested by his testimony on direct examination. *See, Michigan v. Harvey,* 110 S.Ct. 1176, 1177-78; *Oregon v. Hass,* 420 U.S. 714, 722-24 (1975); *U.S. v. North*, 920 F.2d 940, 948 (D.C. Cir. 1990) (dictum), cert. denied, 111 S. Ct. 2235 (1991); *U.S. v. Torres*, 926 F.2d 321, 323 (3d Cir. 1991); *U.S. v. Havens*, 446 U.S. 620, 627-28 (1990); Federal Rules of Evidence, 403.

Since the record is void of any references by Petitioner as to the rifle or shotgun in his opening, direct, or cross-examination, there was no legally cognizable basis for the trial judge to allow the prosecution to discuss these unduly prejudicial items before the jury.

Moreover, based on the number of weapons in evidence, the prosecution was able to portray Petitioner as a liar for having illegal firearms hidden in his apartment. The Government was able to argue that Petitioner's scheme was to "hide the evidence" of the murder, and that his claim of accidental shooting was thus a "big lie".

In the opinion of Petitioner, when the trial court permitted the prosecution unlimited scope on cross-examination, it committed plain error requiring a reversal of his conviction.

III. IT IS PLAIN ERROR FOR THE TRIAL COURT TO GIVE AN INCOMPLETE CHARGE TO THE JURY ON THE BURDEN OF PROOF ELEMENT OF EXCUSABLE HOMICIDE, UNDER VIRGIN ISLANDS LAW.

During the opening statement, Petitioner raised the affirmative defense of excusable homicide by means of an accidental shooting and misfortune, admitting that his care-

less mishandling of the .9mm Glock firearm was the cause of death. Throughout the trial Petitioner offered evidence on this central theme, and he took the stand devoting considerable time explaining and illustrating how the accident occurred. Consistent with Petitioner's theory of the case, his counsel requested that the jury be charged that "excusable homicide" by means of accident and misfortune was an absolute defense under Virgin Islands law, and that such a finding by the jury mandates an acquittal.

The Court of Appeals for the Third Circuit has provided guidance as to the necessity for complete jury instructions on the burden of proof element of the affirmative defense of *excusable homicide* under Virgin Islands law. *Government of the Virgin Islands v. Smith*, 278 F.2d 169 (3d Cir. 1960) (epileptic seizure at the time of a alleged vehicular homicide) and *Government of the Virgin Islands v. Smith*, 949 F.2d 677 (3rd Cir. 1991) (self-defense to murder) control this issue. Moreover, in *Smith, id.*, at 681-682, the Court re-affirmed prior decisions where it held "that Virgin Islands law requires the government to disprove affirmative defenses once some evidence has been presented on the issue", citing *Government of the Virgin Islands v. Bellott*, 495 F.2d 1391, 1397 (3rd Cir. 1974) (insanity defense), and held that the failure to give a *complete* jury instruction on the burden of proving the absence of self-defense beyond a reasonable doubt constituted "plain error".

Petitioner's counsel specifically requested an instruction on excusable homicide by means of accident and misfortune consistent with Virgin Islands law. The only instruction the jury received was the following:

> Homicide, that is to say, the killing of another person, is excusable under the law of the Virgin Islands when committed by accident and misfortune, or in doing any lawful act by means, with usual and ordinary caution, and without any unlawful intent.

The trial judge made no mention of the government's burden of proving the non-existence of excusable homicide which was the sole defense. In the absence of such a charge, the jury might have concluded that Petitioner failed, in his efforts, to prove his case of excusable homicide and, thus, convicted him.

In *Smith, id.* at 681, the Third Circuit mandated that the jury be instructed separately regarding the prosecution's burden of proof on that issue, and stated that failure to provide a burden of proof instruction on self-defense constitutes *plain error* even in the absence of an objection from the defense.

In the opinion of Petitioner, the trial court failure to give a complete instruction on the burden of proof element of excusable homicide was plain and reversible error. Consequently, the decision by the appellate court to affirm Petitioner's conviction is clearly inconsistent with its own prior decisions. *See, Government of the Virgin Islands v. Smith, infra.*

CONCLUSION

For all the reasons stated above, Petitioner respectfully urge this Court to grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7153

GOVERNMENT OF THE VIRGIN ISLANDS

v.

LYNDON FREDERICK
Lyndon B. Frederick, Appellant

(D.C. Crim. No. 93-cr-00052)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH, LEWIS,
McKEE and SAROKIN, *Circuit Judges*.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the deci-

sion having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Sloviter
Circuit Judge

Dated: Jan. 13, 1995

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7153

GOVERNMENT OF THE VIRGIN ISLANDS

v.

LYNDON FREDERICK
Lyndon B. Frederick, Appellant

Appeal from the District Court of the Virgin Islands
Division of St. Croix
D.C. Criminal No. 93-cr-00052
(Honorable James L. Watson)

Argued December 6, 1994

Before: SLOVITER, *Chief Judge,*
SCIRICA and COWEN, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit, that:

1. The court (a) erroneously applied the inevitable discovery exception to the exclusionary rule; and, (b) impermissibly received into evidence an expended shell casing and a .9mm semi-automatic Glock pistol recovered during an illegal search of appellant's apartment, as well as the fruits of that illegal search;

2. The court erred (a) by allowing Dr. DiMaio, qualified only as a forensic pathologist with special expertise in wound ballistics, to go beyond his field of expertise and give speculative testimony in his attempt to reconstruct the entire scene and shooting incident; and, (b) by permitting the prosecution to introduce, through Dr. DiMaio, a hearsay, computer enhanced, animated videotaped reconstruction version of the scene and shooting incident;

3. The court erred when it granted permission to the prosecution to cross-examine appellant on the issue of his possession or ownership of the sawed-off shotgun and .410 rifle, which were suppressed as having been illegally seized by the police officers;

4. The court erred in failing to dismiss and/or properly instruct the jury on the charge of obstruction of a police officer in the discharge of his lawful duty, as is required under Virgin Islands laws;

5. Appellant's right to a fair and impartial trial was otherwise violated by the cumulative effect of prosecutorial misconduct which resulted in hearsay, irrelevant, and other unduly prejudicial evidence to go to the jury;

6. The court erred when it failed to instruct the jury on the burden of proof on excusable homicide; and,

7. The sentence imposed on appellant is excessive, it is

ADJUDGED AND ORDERED that the judgment of the district court entered March 3, 1994, be and is hereby AFFIRMED.

BY THE COURT,

/s/ Sloviter
Circuit Judge

Attest:

/s/ P. Douglas Sisk
P. DOUGLAS SISK
Clerk

[Dec. 16, 1994]

APPENDIX C

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

Criminal No. 93-00052

GOVERNMENT OF THE VIRGIN ISLANDS,
Plaintiff,

v.

LYNDON B. FREDERICK,
Defendant.

JUDGMENT AND COMMITMENT

On the 2nd day of March, 1994, Assistant United States Attorney for the Government, James A. Fitzner, and the defendant appeared in person and with counsel, Mark L. Milligan, Esquire.

The defendant was charged with:

COUNT I — MURDER SECOND DEGREE

COUNT II — UNLAWFUL POSSESSION OF A MACHINE GUN DURING A CRIME OF VIOLENCE

COUNT III — OBSTRUCTION OF JUSTICE

At arraignment the defendant pleaded Not Guilty and demanded a jury trial. A jury was selected on December 20, 1993 and the trial began that day and concluded on December 27, 1993. The jury returned a verdict finding the defendant Guilty as charged.

The matter having been referred to the Probation Officer for a pre-sentence investigation and report, which has been filed with the Court, and the defendant having been given an opportunity to make a statement on his behalf, and there being no legal cause why sentence should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

It is ADJUDGED that the defendant be and he is hereby committed to the custody of the Director of the Bureau of Corrections or his authorized representative for imprisonment for a term of thirty (30) years on Count I; ten (10) years on Count II and one (1) year on Count III. Five (5) years of the sentence imposed on Count II shall be served without probation or parole. The sentence imposed on Counts I and II are to be served consecutive to each other and concurrent with the sentence imposed on Count III.

It is ADJUDGED that the defendant be given credit for time served in post-trial detention, to wit: fifty-nine (59) days.

It is ADJUDGED that the defendant's bond is discharged and canceled, and all sureties are hereby released.

It is ORDERED that the Clerk deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer, which copy shall serve as the commitment of the defendant.

DATE OF IMPOSITION OF SENTENCE: March 2, 1994

DATED this 3rd day of March, 1994.

ENTER:

/s/ James L. Watson
JAMES L. WATSON
U.S.D.J.
Sitting by Designation

APPENDIX D

[Filed Jan. 26, 1994]

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Criminal No. 1993-52

(Watson, SDJ by designation)

GOVERNMENT OF THE VIRGIN ISLANDS,
Plaintiff,

v.

LYNDON FREDERICK,
Defendant.

ORDER

The court has before it defendant's motion for a new trial and judgment of acquittal pursuant to Rules 33 and 29 of the Federal Rules of Criminal Procedure, together with the government's opposition and the defendant's reply.

The motion is premised on the contention that it was error for the court to admit the murder weapon, a Glock pistol, as well as a spent casing from a bullet fired by the Glock, over the objection that they were obtained by an illegal search. The motion is also based on a contention that it was error to permit cross-examination of the defendant as to a rifle and sawed-off shotgun found in his premises.

The court adheres to its view that the spent casing was in plain view. The court remains of the opinion that the Glock pistol would inevitably have been found in a

lawful search. Such a search would undoubtedly have been conducted when it became clear that the licensed Smith & Wesson pistol presented to the police by defendant, and identified by him as the weapon that had fired the fatal shot, could not have produced the marks on the casing found on the scene. As soon as further study of the casing indicated the existence of another weapon, or those marks were seen to be of the distinctive type produced by a Glock, a lawful search would have been conducted and the hastily concealed Glock would have been found. That development was inevitable in the view of the court.

The court is also of the opinion that the cross-examination as to the possession of the seized shotgun and rifle was proper, particularly for impeachment purposes in light of defendant's testimony that he only owned one weapon.

As to the motion for judgment of acquittal on the charge of obstructing a public officer in the discharge of his duties, the evidence overwhelmingly supported that charge. The ultimate failure of defendant's attempts to mislead the police is of no consequence.

For the reasons given above, defendant's motions are hereby denied.

/s/ James L. Watson
JAMES L. WATSON
Senior Judge
Sitting by designation

Dated: January 25, 1994

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Criminal No. 1993/0052

Suppression Hearing—III

GOVERNMENT OF THE VIRGIN ISLANDS,
Plaintiffs,

vs.

LYNDON FREDERICK,
Defendant.

Christiansted, St. Croix
December 20, 1993

BEFORE: THE HONORABLE JAMES L. WATSON
U.S. DISTRICT JUDGE

* * * *

MR. FITZNER: Your Honor, could I be heard real briefly?

THE COURT: To make a long story short, I grant the motion to suppress with respect to the rifle and the shotgun. I deny the motion to suppress to the shell casing, which I am sure he's referring to the shell casing from the Glock, not these sawed-off shotgun shells.

Yes, sir?

MR. FITZNER: Your Honor, just to make the situation clear to the Court as I can, there was a lot of ammunition found that was not even addressed by the Court, as shown in this transcript. You might have

heard Jonothan Hitesman state under oath here—you asked him a question about where was the magazine for this Glock and I believe there were other magazines. At least the inference is from his testimony.

Additionally there were other kinds of ammunition, including ammunition compatible for the Glock, found I believe in a military-type ammunition box which was also found in the apartment. That was never addressed at the other hearing and I do not believe it was part of the amended motion to suppress.

* * * *

APPENDIX F

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Criminal No. 1993/052

GOVERNMENT OF THE VIRGIN ISLANDS,
Plaintiff,

vs.

LYNDON B. FREDERICK,
Defendant.

Christiansted, St. Croix
November 8, 1993

BEFORE: The Honorable John P. Fullam
U.S. District Judge

* * * *

COURT'S FINDINGS

THE COURT: All right. I will make my ruling and I can do it now.

I find that the police were called to the scene of a shooting by the defendant, that the shooting took place in the defendant's apartment. And I find that obviously by calling the police to the scene, he made their presence in the apartment apparently lawful and permissible. This entitled the police to seize as evidence anything which was in plain view.

The first question to be addressed, therefore, was what was in plain view. I find that the .9 millimeter Smith & Wesson which was delivered to the police or pointed out to the police by the defendant plainly qualifies as having been in plain view and having been delivered by consent, in any event.

Contrary to the defendant's contention, I also find that the shell casing under the bed was in plain view and they had a right to seize that. I am unable to find that the rifle was in plain view. It was borderline but, in any event, given the testimony of the police officer that it was necessary to move it in order to get a photograph of it so the camerman could see it, I think it would be difficult to concede that it was in plain view until it was discovered and moved. So I do not find that the rifle was in plain view.

The sawed-off shotgun obviously was not in plain view. It was necessary to pry the cover off a recessed compartment in order to see it. And it's equally obvious that the Glock weapon was not in plain view since it was hidden under a box and under some clothing on top of a closet.

The next question is whether any of these items can be considered to have been obtained by consent. I find that the consent did not extend to a consent to rifle through and conduct a complete search of the apartment. I note that the police seemed to have been operating under the impression that once they are called to the scene that gives them carte blanche to do anything which they feel like doing, which unfortunately was not the case.

There is no expressed consent certainly from anybody and I find in the circumstances of this case no implied consent since the defendant himself was outside on the ground in handcuffs while the search was performed. And since the defendant's mother, A, did not have permission to grant consent with respect to that apartment and, B, did not grant consent in any event and, C, was ordered out of the apartment before the search began, I find that

the vague evidence to the effect that she was in and out thereafter does not give rise to an implied consent on her part to the search that was being conducted. Her interest obviously was in trying to get medical help for the victim and worrying about the very tragic events which had occurred.

Therefore, that leaves as the only possible basis on which the Government can prevail the question of inevitable discovery. And, as I understand the law under the *Nicks* (sic.) case and the Third Circuit case that preceded it, if the Government can show by a preponderance of the evidence that the evidence sought to be suppressed would inevitably have been discovered legally, then the fact that they actually discovered it illegally does not warrant exclusion of the evidence at trial.

I find that in the normal course of police procedure, the police are entitled, when called to the scene of a crime, to secure the premises. And it's quite apparent that once it became known to them that the defendant's version of the alleged accident was not acceptable, and once it was learned by them that the weapon which he said was used in the shooting was not the weapon upon used in the shooting, they obviously would have had not only a right to obtain a warrant but inevitable motive for obtaining a warrant and that warrant would have authorized them to search for the weapon which was used in the shooting.

I conclude that they had enough information at the scene to realize that the defendant's explanation was not correct. And based on the testimony of the witness here this morning, Mr. Hitesman, I find that they actually did believe at the scene of the crime that the weapon which the defendant said had been used was not the weapon that—was probably not the weapon which had discharged the shell casing. And given the proximity of the shell casing to the scene on the murder, I conclude that they believed at that time that it was probable that some weapon other than the Smith & Wesson had been used

in the shooting. They, therefore, had an open and shut motive for obtaining a search warrant and would have had open and shut grounds to be issued a search warrant if they had been paying any attention to what the law is and had given thought to the need for a warrant.

I conclude that because they had the place secured that it would not have been possible for anybody to remove the weapon before they came back with a warrant. And, therefore, the discovery of the Glock weapon was inevitable.

I do not reach that conclusion, however, with respect to the other weapons. I conclude that if the police had proceeded as they normally would have, they would have searched the apartment for a Glock weapon which they believe was used in the shooting and it is likely that they would have found the Glock weapon at least as—would have found the Glock weapon and would have had no reason to pry open the recessed compartment where they found the sawed-off shotgun. They would undoubtedly have found the shells for the sawed-off shotgun because they would have check the drawers, I presume, but I don't know the relevance of those shells to any issue in this case, anyway.

To make a long story short, I grant the Motion to Suppress with respect to the rifle and the shotgun. I deny the Motion to Suppress with respect to the shell casing and the Glock semi-automatic weapon.

I express no view as to the implications of this ruling with respect to any other items of evidence which may have been uncovered in the apartment but which were not specified in the Motion to Suppress, and I leave all such issues to the tender mercies of the judge who will try the case.

(Whereupon, the proceedings were concluded.)

APPENDIX G

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Crim. No. 93-52

GOVERNMENT OF THE VIRGIN ISLANDS,
Plaintiff,

v.

LYNDON B. FREDERICK,
Defendant.

November 5, '93

TRANSCRIPT OF SUPPRESSION HEARING

BEFORE THE
HONORABLE JUDGE JOHN P. FULLAM

* * * *

THE COURT: I'll be available if you want to present him. It's your case, not mine.

MR. FITZNER: I guess I wouldn't see any need to do it, Judge, but it depends on your ruling in this case. If it's a close case, I would request an opportunity.

THE COURT: I'll be glad to tell you which way I'm leaning. I don't see any conceivable way you can get the sawed-off shotgun into evidence. I don't see any conceivable way you can get the Glock into evidence

unless somebody can support an argument which has not been made yet. Let me give you my thoughts.

Obviously, the police were unlawfully on the premises. And they had a right to be in the apartment, they a right to be in the bedroom. Obviously that carries with it the right to seize any evidence which is in plain view.

I conclude that the shell casing found under the bed was in plain view. And although it's a close question, I think it's probable that the rifle found on top of the closet was in plain view, or at least the butt of it was.

Certainly neither the Glock nor the shotgun was in plain view. So the next question is was there consent to the search. And I don't see how you get consent here.

The final question is, which is the one which has not been addressed, and that is would this evidence, the Glock and the shotgun, have inevitably been discovered anyway?

It seems to me obvious that any reasonable, competent police officer would have secured the crime scene and obtained a search warrant and there is little or no possibility that anything could have happened to remove these weapons until they did search the place.

The real issue is whether by taking the shortcut that they took they have messed up their ability to use those two items of evidence. If you can come up with a theory that would either alter the evidence on consent or plain view, or if you can come up with some arguments inevitable to discovery, I would be happy to hear them.

MR. FITZNER: I wonder if I could, I submitted a brief this morning, I don't know if The Court has it.

THE COURT: It doesn't saying anything about discovery.